

# **INVOLVEMENT SITUATION ASSESSMENT**

## **MISSOURI RIVER AUTHORIZED PURPOSES STUDY**

~ A Report to ~

US Institute for Environmental Conflict Resolution  
for the U.S. Army Corps of Engineers

~ Prepared by ~

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## I. EXECUTIVE SUMMARY

This assessment produced several fundamental findings that point to a context in which conducting the Authorized Purposes Study will be challenging.

- The highly politicized environment.
- The number and magnitude of the various Missouri River processes.
- Generally low confidence in the Corps.
- The fact that various interests have the potential to derail the Study process, findings and recommendations.

Regardless of this difficult context, there is a strong sense throughout the Basin that change is needed.

Based on these and other factors, we conclude that a consensus-seeking process is not advisable, but that there is motivation on the part of citizens to participate in the Study, provided the U.S. Army Corps of Engineers (Corps) clearly defines the role of the public and provides meaningful opportunities for engagement.

The Osprey Group recommends a three-pronged approach. This includes choices among traditional techniques to inform the public and Tribes, other means to involve the public and Tribes, and, finally, collaboration that is both efficient and representative of the various interests in the Basin. The first two, focusing on informing and involving, are considered foundational to any effective public engagement process. The collaboration component builds on these two and provides a valuable opportunity to engage broad-based senior leadership during the Study's implementation.

Osprey recommends that the collaboration take the form of an Executive Council with this fundamental structure:

- Corps senior leadership participates in person
- Missouri River Basin governors are invited to appoint a single state employee
- Pertinent federal agencies (for example, EPA, USFWS, BOR and WAPA) are asked to appoint one representative each
- Two government representatives are invited from the Mississippi River Basin

We recommend key operating assumptions for such a Council that include:

- The Corps provides information and its perspectives to the Council
- The Council provides guidance and counsel to the Corps
- Members participate as knowledgeable and experienced individuals
- The group is not a decision-making body
- Votes are never taken



The Corps has the opportunity to maximize understanding of and engagement in the Missouri River Authorized Purposes Study in spite of the difficult context in which it will be conducted. It can do this through an Executive Council and carefully selected and well-implemented techniques to inform and involve the public and Tribes.



## II. BACKGROUND

### THE MISSOURI RIVER AUTHORIZED PURPOSES STUDY

The Army Corps of Engineers has been directed by Congress to review the original project purposes established by the 1944 Flood Control Act as amended. This Missouri River Authorized Purposes Study is the first comprehensive review of the legislation that created the system of dams and reservoirs on the Missouri River and its major tributaries. The Study will report to Congress whether changes in these purposes and the existing federal water resource infrastructure managed by the Corps and Bureau of Reclamation are warranted. The 1944 Flood Control Act, as amended, authorized the System for:

- Fish & wildlife
- Flood control
- Irrigation
- Navigation
- Power
- Recreation
- Water quality
- Water supply

### THE PURPOSE OF THIS ASSESSMENT

The purpose of this assessment is to discover how the Corps can best develop a Project Management Plan that is inclusive of the diverse interests in the Basin. The assessment explores the level of interest among Tribes and the public to engage in collaboration and consensus building efforts during the course of the Study. It identifies critical issues, challenges and opportunities and develops options and recommendations for the Corps to consider. These issues are not addressed from a social, economic, technical or engineering perspective.

There are many alternatives for the Corps to effectively engage the public in the Authorized Purposes Study process. The recommendations contained in this assessment are not meant to be the last word. We offer the Corps alternatives and recommendations based on our professional experience and the information we gathered. Any public engagement process should be aligned with the purposes and processes of the Study itself. Ultimate decisions about how to engage the public and the Tribes need to be based on a careful weighing of numerous factors, including the information presented in this report, but also the Corps' mission, procedures and regulations, resources and other variables.

To conduct the assessment, the Corps engaged the U.S. Institute for Environmental Conflict Resolution (USIECR), which contracted with the Osprey Group (Osprey). Both are neutral third parties.



This assessment reflects what we heard during personal interviews, focus groups and from the general public. It does not necessarily reflect the views of the U.S. Army Corps of Engineers or any other federal agency, the U.S. Institute for Environmental Conflict Resolution, or the Osprey Group on any of the substantive issues to be considered in the Study. Rather, it reflects a sample of perspectives taken over a several-month period, which, while intended to be representative, do not constitute an all-inclusive or exhaustive view of the issues.

## HOW THIS ASSESSMENT WAS CONDUCTED

The assessment is based on confidential individual interviews, focus group discussions, meetings with Tribal leaders and members, and an electronic survey accessible to anyone. Osprey conducted 82 individual interviews. These interviews were augmented with focus group discussions involving 90 additional people. The interviews, focus groups, meetings with Tribal members and electronic survey were used to gain an understanding of the issues, concerns, and opportunities with respect to the Missouri River Authorized Purposes Study. They provided Osprey with the necessary information to develop viable options and recommendations to communicate with and engage the Tribes and other citizens during the course of the Study.

### Participant Selection

Osprey sought geographic and interest balance in scheduling personal interviews and focus group discussions (Appendices A and B list interviewees and focus group participants and Appendix C shows the distribution by state). Osprey used a combination of existing lists of interested people, others involved in Missouri River processes, and recommendations from interviewees to identify and invite participants. In the case of New Orleans and Memphis, Osprey relied primarily on Corps suggestions for participants.

### Personal Interviews

Telephone interviews started in late October 2009. These interviews typically lasted about 45 minutes and covered a range of substantive and process design topics. Osprey relied on a semi-structured interview guide in conducting the interviews. Osprey asked a mix of quantitative and open-ended questions. Responses were confidential and not for attribution.

### Focus Group Discussions and Initial Meetings with Tribal Members

Seven focus group sessions were held in the Missouri River Basin with an additional two focus groups along the Mississippi River.



Focus groups were held in:

- Kansas City, Kansas
- Bismarck, North Dakota
- St. Louis, Missouri
- Omaha, Nebraska
- Pierre, South Dakota
- Billings, Montana
- Columbia, Missouri
- New Orleans, Louisiana
- Memphis, Tennessee

Osprey sought a representative group of approximately 12 people for each focus group. In some communities, the weight of the group tended toward the particular interests of that specific geographic area. None of the groups alone were representative of all the varied interests throughout the Basin, but, in aggregate, the major interests were represented in one or more focus groups. Invitees were asked questions designed to generate a productive discussion about Missouri River issues as they see them and how to design Tribal and public engagement during the course of the Study. The focus group discussions normally began at 5:30 pm and continued until 7:00 pm. Then, an opportunity was provided for other members of the public in attendance to present their perspectives.

Osprey worked with Tribal organizations to determine how and where to engage Tribal leadership and members. Interactions with the Tribes are limited to-date. Additional meetings are being scheduled at Tribal locations. Meetings with Tribal members took place in Rapid City, Omaha, Pierre and Billings. An addendum (Appendix J) to this report will be presented to the Corps with Osprey's refined recommendations about how to best engage the Tribes during the course of the Authorized Purposes Study. The assessment presented in this document about Tribal engagement is preliminary.

### Electronic Survey

To supplement the information gathered through personal interviews and focus groups, members of the public were invited to fill out a brief, confidential electronic survey. The survey took about five minutes to complete. It was available through a website hosted by the U.S. Institute for Environmental Conflict Resolution (<http://mraps.ecr.gov>). The link to the survey was mentioned at every focus group meeting and included as part of a fact sheet, which highlighted background and expectations for the assessment and dates and locations of events. The survey software allowed only one survey to be completed from any particular computer. The electronic survey was considered in our assessment; however, we placed greater weight on personal interviews and the focus group discussions. The electronic survey gave an opportunity for anyone to provide input, but it



is not a statistically reliable tool based upon traditional sampling techniques. There were over 500 responses to the electronic survey. Appendices D and E show statistical information from the personal interviews and the electronic survey, respectively.

### THE SITUATION ASSESSMENT PRODUCT

This Assessment report:

- Summarizes the context in which this Study will be conducted
- Recommends specific options for the Corps' information sharing, involvement and collaboration and preliminary design of possible processes for Tribal engagement during the Study

This Assessment is the independent work product of Osprey on behalf of USIECR. The USIECR and Osprey will share the final product with the Corps of Engineers and distribute it electronically to all interviewees and focus group members. The Corps will then make the report available on its website ([www.mraps.org](http://www.mraps.org)) and the Institute will post it on theirs (<http://mraps.ecr.gov/>).

### TIMELINE AND OPPORTUNITY TO COMMENT

The assessment was conducted between October 2009 and March 2010. This report was distributed on April 9, 2010 and will be posted on the U.S. Institute website ([mraps.ecr.gov](http://mraps.ecr.gov)) on April 12, 2010. Comments about the report are welcome and may be made to the U.S. Institute until May 7; please email comments to Gail Brooks at [brooks@ecr.gov](mailto:brooks@ecr.gov). The Institute will aggregate comments as an addendum (Appendix I) to this report. Comments will be available for review at the Institute's website by May 21.





### III. CONTEXT

#### OVERVIEW

There are a range of difficult contextual issues that the Corps will face as it launches into the Missouri River Authorized Purposes Study. Many are acrimonious and reflect deep-seated conflicts developed over the years. Most serve to divide the Basin rather than unite it.

The Study will prove challenging because of this contextual environment. Some of the key contextual issues are identified below and discussed in the following paragraphs.<sup>1</sup> The challenges presented in this section set the stage for the options and recommendations that follow.

#### CONTEXTUAL ISSUES

- History of conflict
- Tribal relations
- Perception of the Corps
- Political environment
- Evolving uses of the river
- Perception of the need for change

#### History of Conflict

The Missouri River has a long history of conflict. The Pick-Sloan Plan, a merger of ideas to develop the Missouri River watershed from Colonel Lewis Pick of the U.S. Army Corps of Engineers, focusing largely on flood control and navigation, and William Sloan of the Bureau of Reclamation, emphasizing irrigation and power generation, is sometimes popularly referred to as a “shameless shotgun marriage.”

The construction and management of the system of dams and reservoirs on the Missouri River and its tributaries did provide benefits to many who live and work along the river, but it also failed to fulfill all that was promised and fostered continued conflict. The promise of extensive irrigation for many acres of land was never realized. Tribes and farmers suffered dislocations resulting in lingering resentment. There have been years of litigation and battles among states and various interests. The uneven benefits of power generation and power pricing have been an annoyance for some. The recent pressure to address endangered species is a lightning rod issue and, while some are committed to finding a reasonable solution and restoring ecosystems, others see protecting endangered species as a major misuse of resources.

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<sup>1</sup> There are also other contextual issues beyond these primary ones. They are described in Appendix F.



Comments from participants point to continued contentiousness within the Basin:

### Comments Related to Conflict in the Basin

- “This is water war.”
- “Folks are drawing lines in the sand – are going to fight this.”
- “There are dug-in interests throughout the Basin.”
- “This will be the most controversial thing to happen on the river since 1944.”
- “People are already putting on their armor getting ready for a fight.”

When queried about purposes that are at odds with one another, many see conflict between recreation and navigation. Others, however, believe this is overly simplistic and believe there are ways to accommodate both uses simultaneously. Some noted other competing purposes such as flood control and fish and wildlife habitat. One challenging issue, that many believe could provide mutually beneficial solutions, is addressing the increasing amount of sediment held behind dams.

More conflict occurs when water is in short supply. Many believe the Corps does a reasonable job in allocating water to address the varied priorities, but when drought conditions are present, the demands for water outstrip the supply and difficult tradeoffs among competing priorities become a necessity. These choices have significant consequences.

### Tribal Relations

There are 28 Tribes in the Basin. Many of the Tribal Nations were severely impacted by the construction of dams and reservoirs along the Missouri River. During our assessment, interviewees generally, though not universally, thought the 1944 Flood Control Act most negatively impacted the Tribes. They also believe the Tribes had limited involvement in the early years and should be more fully engaged during this Study.



Examples of comments are:

Comments Related to the Tribes
<ul style="list-style-type: none"><li>• “Tribes weren’t considered in the Pick-Sloan Act.”</li><li>• “Acknowledge the Tribes and how they have been damaged.”</li><li>• “I don’t know what their big gripe is.”</li><li>• “Go see the Tribes and respect their sovereignty.”</li><li>• “The bottom land was our sustenance and freedom; it was our entire livelihood. This was a major taking.”</li><li>• “It looks like a vindictive wedge. They got paid a fair price at the time.”</li><li>• “None of the concerns from the Tribes were heard during the Master Manual update.”</li></ul>

When those we interviewed were asked if there are other purposes that should be considered beyond the eight, Tribal or cultural resources was the most commonly cited additional purpose. Others thought Tribal issues should be recognized but could be addressed within the existing purposes. Interviewees indicated that historically, Tribal Nations have played a minor role in helping define Missouri River water policy even though, arguably, they have been negatively impacted more than any other single interest or community.

### Perception of the Corps

The Corps’ reputation makes this Study more challenging. There are some who see the Corps as doing an admirable job in balancing competing priorities. One person even used the term “masterful.” However, most see the Corps as falling short in how they operate. Much criticism of the Corps is focused less on the actual operations of the Missouri River system and more its approach dealing with the public and key constituencies. Criticism is often more about “how” the Corps operates than “what” it does. The Corps’ reputation also seems to translate what some would see as strengths (e.g., predictability, thoroughness, stability) into perceived weaknesses (e.g., slow, rigid, unbending). The Corps is characterized with words such as secretive, inflexible and unresponsive. This reputation results in a good deal of public skepticism.

No matter how thorough and objective the research, the ultimate impact of this Study will likely be more a function of understanding and acceptance of the findings and conclusions than it is about its analysis. This will depend upon how well the Corps communicates with and involves the public throughout the Study process. We consistently heard that in order to improve the possibility of better understanding and acceptance, the Corps would need to go the extra mile with its collaborative efforts and



the accompanying outreach if this study is to be considered transparent, inclusive and responsive.

### Political Environment

The political environment is perhaps the most influential factor affecting the Authorized Purposes Study. Sponsorship of this Study by Senator Dorgan from North Dakota has concerned many in the lower Basin, particularly those interested in protecting navigation on the river.

Comments from interviewees and focus group participants include:

#### Comments Reflecting the Political Environment

- “This is entirely a political battle to get rid of navigation.”
- “The Federal government gave the people a chance of a lifetime.”
- “Some hard choices will need to be made.”
- “The people who want the status quo are the most powerful.”
- “Balance has been achieved by a number of fist fights throughout the Basin.”
- “This Study will only have a ten percent impact on the final outcome; the rest will be political.”
- “If the stakeholders up and down the river can come up with a signed, sealed and packaged solution, then the politicians can’t touch it.”

While these comments come from interviewees throughout the Basin, similar language comes from Congressional leaders and it reflects and reinforces the parochial nature of the issues. As one interviewee said, “the Senate debate was like dinosaurs fighting.” The Congressional rhetoric reflects certain northern and southern Basin perceptions:

- “This is a great example of studies to try to impact policy, so that you keep having continuous studies.” Senator McCaskill, 2009
- “Yet the river is still managed for the minnow and not the whale, which is typical of the Corps of Engineers. Never change. Resist change. Never change, no matter what. . . . It is long past time that the river be managed with the recognition of its current use.” Senator Dorgan, 2009
- “The future of the river downstream, where the large majority of users live, remains in energy production, water supply, and energy and cost efficient transportation that is clean.” Senator Bond, 2009



With this political backdrop, many see this as a Study, motivated largely by intra-basin politics, which attempts to impact water allocation policy when other means have failed. These people consider this Authorized Purposes Study a wasteful effort that will ultimately be decided in Congress regardless of Study findings and recommendations. These individuals believe that politics will trump any objective analysis. Unless the various interests are engaged and believe in the efficacy of the Study process and findings, they will likely pursue political channels to derail the Study.

Others bring a more hopeful and less fatalistic view to the table. They see this as a timely opportunity to objectively and transparently assess the purposes of the 1944 Flood Control Act and, based on sound analysis, recommend realignment of purposes to contemporary needs. They see this as an opportunity to examine the purposes for which the river is managed from a fresh perspective.

### Evolving Uses of the River

The Corps is planning its NEPA scoping for the Authorized Purposes Study for the summer of 2010. While this assessment is clearly not part of the scoping process nor a substitute for it, perspectives received suggest a number of patterns or views about priority uses.

Some comments reflect perceptions about the evolving uses of the river:

#### Comments about the Evolving Uses of the River

- “Hold water upstream rather than releasing it for ghost barges.”
- “Because of the lack of predictability, no entities feel comfortable investing in navigation on the Missouri.”
- “The Tribes are looking at the prior appropriation doctrine because the 28 Indian Tribes have claims on the water.”
- “The Endangered Species Act is the big dog in this fight.”
- “The Act was made in the 40s and priorities have changed over time.”
- “Flood control, water supply and power generation are still important; navigation and irrigation are not.”

Most see the eight existing purposes as comprehensive and workable. But, there is a sense of priority among those with whom we spoke and who spent the time to complete the online survey. In both surveys, participants were asked to rate the purposes. The results from the electronic survey are somewhat different from the personal interviews. However, many in both groups see flood risk management, water supply, water quality and power generation as clear priorities and consider irrigation and navigation to be lower priorities. The responses from each survey are shown in Appendices D and E.



These perceptions may or may not be consistent with the Corps' ultimate analysis. One could argue that some of these perceptions could be expected given that many people benefit from certain purposes, such as flood control or water supply, while fewer are directly connected to purposes such as irrigation or navigation. Nevertheless, the survey results show that some purposes continue to have widespread support throughout the Basin while others do not.

In addition, there are many who believe there are purposes that warrant additional attention. For example, 44 percent of those responding to the electronic survey indicated there are purposes that are not adequately addressed. These included nearly all the existing purposes, including irrigation and navigation, but were most heavily focused on fish and wildlife habitat and recreation. Some participants suggested additional purposes. These included sedimentation management, Tribal interests, ecosystem functions and services, social and economic impacts, and flows in the Mississippi River.

### Perception of Need for Change

There is a strong perception by some people that current management of the river is reasonable and appropriate. However, during the course of this assessment we found that most people think change is needed. Some comments from interviewees and focus group participants reflect this sentiment:

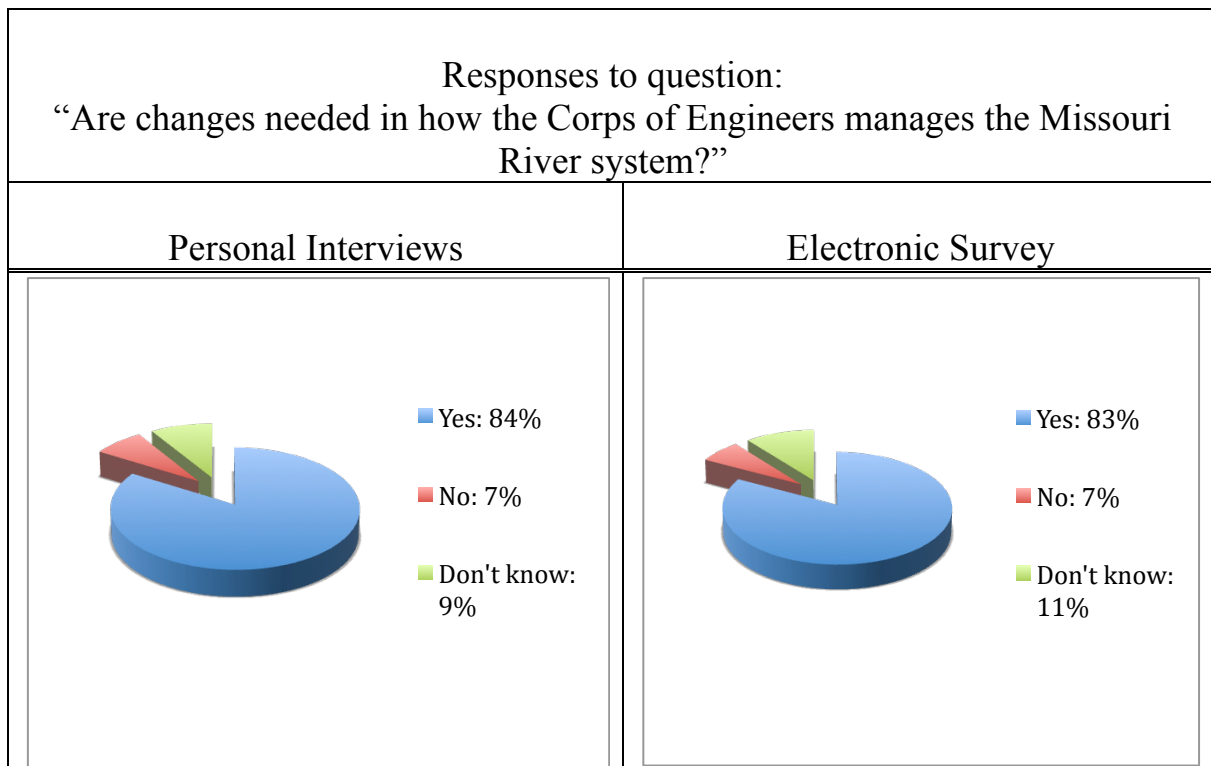
#### Comments about the Need for Change

- "Some things, like the ESA, were not on the radar in 1944."
- "Naturalize the river system as much as possible."
- "Navigation is at odds with everything."
- "Recreation is not essential."
- "We can have viable recreation and navigation."
- "Need to figure out how to adaptively manage the river based on scientific data."
- "Need to acknowledge the economic impacts of the management of the river."
- "What we need is a fresh look."

In both the personal interviews and the electronic survey, interviewees were asked: "Are changes needed in how the Corps of Engineers manages the Missouri River system?" The results were surprisingly similar. We found that 84 percent of those we personally interviewed said changes are needed. In the electronic survey, 83 percent said changes were needed as well. The results from both the personal interviews and the electronic survey are shown below:<sup>2</sup>

<sup>2</sup> Numbers may not add precisely to 100.0 percent due to rounding.





In a follow-up question, participants were asked to characterize the magnitude of the change that is needed – major, moderate, minimal or no change. In the personal interviews and the electronic survey, 47 and 46 percent respectively of those that said change is needed in how the Corps manages the system said “major change” is needed.

These data are, of course, open to interpretation. Some believe most people would opt for change over the status quo in almost any situation, and a high percentage of people saying change is desirable should be expected. Others question the kind of change a respondent might be proposing. In our personal interviews, we did explore the kinds of changes that the interviewees thought might be appropriate. While some said that they would prefer to see change that would bring river management back to what it might have been several decades ago, most suggested changes in management to reflect emerging priorities. These included such things as recognizing Tribal interests, letting the river operate more naturally, protecting endangered species, recognizing the rising importance of recreation, and recognizing the entire River as an integrated system including the Missouri River tributaries as well as the flows into the Mississippi River. A number of respondents also mentioned their desire for the Corps to make decisions in a more inclusive and open manner.



## OSPREY SUMMARY

The Osprey Group assessment suggests several fundamental findings that point to a context in which conducting the Authorized Purposes Study will be challenging.

- The highly politicized environment.
- The number and magnitude of the various Missouri River processes.
- Generally low public confidence levels in the Corps.
- Various interests that have the potential to derail the Study process, findings and recommendations.

While the context will be difficult, there is a strong sense in the Basin that change is needed. Many characterize the change needed in how the Corps manages the system as “major.”

It is important that the Corps’ report to Congress be widely understood and accepted. Osprey believes, based on what we heard, that the effort to gain understanding and acceptance of the Study will only occur through timely and successful implementation of a variety of the public engagement options described in the next two sections.





## IV. OPTIONS FOR MOVING FORWARD

The previous section described the context in which this Authorized Purposes Study will be conducted. This section outlines options for moving forward that the Osprey Group considers viable. Section V summarizes our recommendations. The options below are appropriate for consideration for both Tribal nations and other citizens and institutions. They are based on opinions and suggestions expressed during the interviews and focus groups we conducted, our professional experience, and the feedback received during and the comments received after the two public input sessions held in early March that previewed many of these suggestions.

### PERSPECTIVES ABOUT PUBLIC INVOLVEMENT

During the personal interviews and focus group discussions, we heard a wide spectrum of opinions and suggestions about how to involve the public and the Tribes in the Authorized Purposes Study as it moves forward. A few illustrative comments are cited below:

#### General Comments about Public Involvement

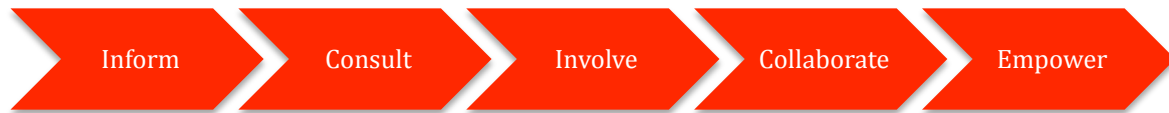
- “We want to know that 25 or 30 years down the road this was a good process and it looked at a long-term vision rather than short-term interests.”
- “I am a big believer in true engagement. I’ve seen too much of the three I’s -- invite, inform and ignore. We need to move beyond that. There has to be a way to say, ‘here’s our starting point, which we’re willing to modify, what do you think?’ We need true engagement.”
- “The Corps needs to figure out how to make this an inclusive process.”
- “Use a multi-pronged approach.”
- “There sure ain’t no silver bullets.”

Because of the political environment in which the Study will be conducted and their past or current experience, many people are cynical. Nevertheless, we received numerous helpful suggestions. Common to these are admonitions that the Corps needs to be open, transparent and collaborative, moving from a perceived “command and control” approach to one that informs and engages the public and the Tribes more effectively. We frequently heard comments about the need for inclusivity.



## A SPECTRUM OF PUBLIC INVOLVEMENT

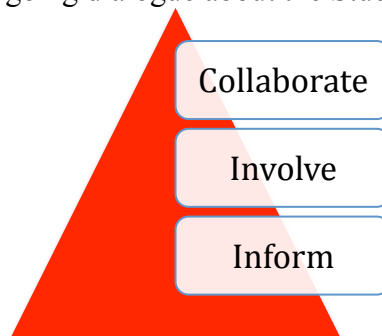
The International Association for Public Participation has developed a spectrum for public involvement:<sup>3</sup>



The Osprey Group used this spectrum as a tool for analyzing possible viable options. We developed and evaluated options in three primary areas.<sup>4</sup>

- Inform – A one-way communication through which the Corps provides information about things like the Study schedule, opportunities for input, options under consideration, analysis and both draft and final decisions.
- Involve – The Corps engages in two-way interactive communication with others in a way that provides them with an opportunity to discuss and convey concerns and suggestions directly.
- Collaborate – The Corps engages in interactive dialogue with others who provide ongoing counsel about the Study’s implementation.

The diagram below reflects the foundational role of informing. Involving is fundamental since it provides opportunities for interaction. Finally, the capstone is a collaborative process that could provide ongoing dialogue about the Study with the Corps.



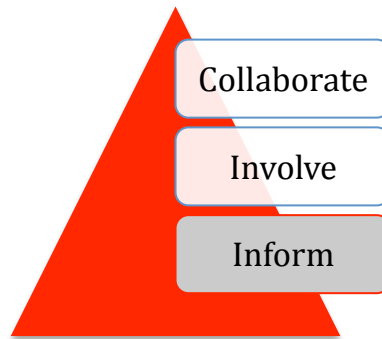
<sup>3</sup> [http://www.iap2.org/associations/4748/files/IAP2%20Spectrum\\_vertical.pdf](http://www.iap2.org/associations/4748/files/IAP2%20Spectrum_vertical.pdf) /

<sup>4</sup> Although the techniques available under “consult” might be useful, Osprey chose to focus on “involve” based on suggestions received at the focus groups through the personal interviews and our conclusion that direct interaction with Corps and Study personnel at key points in the process is important. Osprey did not pursue options under “empower” because the Corps is obligated by law and the authorizing legislation of this Study to maintain authority over the results.



Typically, most people are reached through “inform” activities. If inform techniques are performed well, many people will be satisfied, and they will not use meetings and other “involve” programs to meet their needs for basic information. A smaller number will still want to be “involved.” Finally, only a few can or want to engage in “collaboration” activities. If collaboration is done well and perceived to be fair and transparent, the public is often comfortable letting those with the most knowledge and experience participate at that level.

## INFORM



The Corps effectively providing information to the public is essential to the success of this Study. It provides the foundation for additional involvement and collaboration. In this context of a history of conflict and low trust, the Corps should ensure that “inform” includes information both about the study process and the substantive issues. Without effective efforts to inform, through a variety of mechanisms, involvement and collaboration efforts will fall short and the credibility of the Study will suffer.

Over the course of the interviews and focus group discussions, many people spoke of their need for timely and succinct information. This need was widely expressed relative to information about both the process and the substantive sides of the Study. On the process side, in the course of this Assessment, some people complained about the lack of adequate advance notice about upcoming focus group meetings and their lack of understanding about what to expect for the purpose and structure of the focus groups.

Informing people is essentially a one-way communication aimed at providing information. Selected comments from interviewees and focus group participants about this form of communication included:



## Comments about Informing the Public

- “PSAs, TV and radio reach a lot of people.”
- “An on-line forum would allow members of the public and interested stakeholders to look at the data and get a better understanding.”
- “The computer’s a wonderful thing if you make use of it”.
- “Take advantage of new technologies, but recognize that some stakeholders have difficulty with access.”

Options which Osprey considers viable to inform the public include:

- Press releases: A tried-and-true mechanism for informing people, press releases have the advantage of needing to convey information concisely and accurately. They are particularly useful to announce events in a way that various media can disseminate so that people are informed and may decide to attend.
- Email list serve: Lists of email addresses are easy to compile, although they require attention to be kept current. An advantage of email distribution of information is that it provides “instant communication” that recipients can easily forward to others. It is important, however, to realize that many people lack easy access to powerful computers, up-to-date software and fast connections to the internet.
- PSAs: When used by radio and local television stations public service announcements have the advantage of reaching people who may lack good or frequent access to email.
- Fact sheets: Simple fact sheets can be produced and distributed widely as email attachments, made available for meetings and be used in mailings. A page or two in standardized format about each of the eight Authorized Purposes, for example, could go a long way towards helping the public become informed with current and accurate information. Fact sheets could also be used to provide updated information about the overall Study process and be clear about expectations for timelines and deliverables.
- FAQs: Frequently-asked-questions information, commonly known as FAQs, is an efficient way to provide information and answer common questions. FAQs, similar to fact sheets, lend themselves to various means of distribution, from handouts at meetings to attachments to emails to posting on websites.

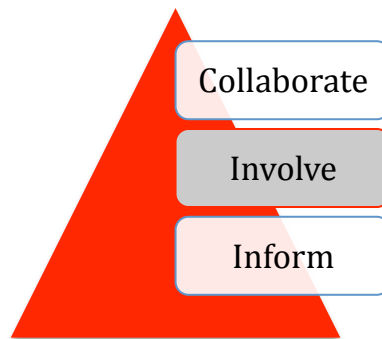


- Website: Both the Corps and the USIECR initiated MRAPS websites when the Authorized Purposes Study began in late 2009. Websites provide an excellent place for members of the public to find current information.
- Social media and digital platforms: A great variety of “social media” such as Facebook and Twitter are now broadly used throughout the country. In addition, digital platforms for “meetings,” receiving presentations and sharing ideas over the internet are now available. Although specific technologies come and go, they should be considered because of their abilities to reach wide audiences.
- Video: Digital videos are an excellent mechanism for providing information to a variety of audiences. These can be distributed either as DVD’s or as “streaming video” over the internet. Links to streaming videos can easily be distributed in fact sheets or as part of FAQs. The availability of both formats reduces the unintended exclusion of audiences without updated computers or fast internet connections. The Corps and other federal agencies currently make good use of streaming video. Current Corps examples may be found at <http://www.army.mil/media/amp/?bcpid=6981683001&bctid=17731769001>. Another example is the “Big Muddy” video by the U.S. Fish and Wildlife Service: [http://www.fws.gov/digitalmedia/cdm4/item\\_viewer.php?CISOROOT=/natdiglib&CISOPTR=9218&CISOBX=1&REC=1](http://www.fws.gov/digitalmedia/cdm4/item_viewer.php?CISOROOT=/natdiglib&CISOPTR=9218&CISOBX=1&REC=1). Video streaming is also effective in the presentation of narrated “slideshows.” An example from the Fish and Wildlife Service is: <http://www.fws.gov/invasives/volunteersTrainingModule/outreach/presentation.html>.

In sum, there are various communication techniques, some of which are evolving and providing new and creative tools to inform people. Information should be provided to the public in ways that do not require large amounts of time, expertise, or traveling long distances. As mentioned earlier, these mechanisms should be viewed as foundational – necessary, but not sufficient in the Corps’ public engagement program.



## INVOLVE



Involvement implies two-way interactive communication. The Corps has long experience with many of the techniques we consider viable and less familiarity with others. The importance of this component in the public engagement strategy should be underscored. The importance is reflected in comments from both interviewees and participants at focus group discussions:

### Comments about Public Involvement

- “Meetings need to be where the people are.”
- “Open house workshops, this could work well in this process.”
- “On the idea of rolling focus groups, each time you go back to the same group it increases their education.”
- “Need to have the technical teams making sound decisions.”
- “Public meeting: Too many times the process turns into grandstanding.”

There are several viable options that fall into the involve category:

- Public meetings: Federal and other agencies use public meetings frequently. They provide opportunity for everyone to be heard and their comments to be documented. To be particularly effective, these meetings provide an opportunity for two-way communication. They are not the same as public hearings.
- Association meetings: The regularly scheduled meetings of various “associations” throughout the Basin present an opportunity for the Corps to provide information to pre-assembled groups of people. If the Corps meets with the same group more than once the sequential nature of such meetings present increasing potential for “involvement” rather than simple “informing.” Examples of associations in the Basin with interest in the authorized purposes might be those whose members have formed to focus on areas such as navigation,



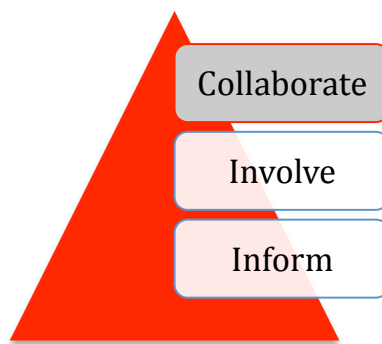
municipal water, rural electricity, recreation or the environment. Or they could involve broad-based associations such as the Missouri River Association of States and Tribes (MoRAST) or any similar associations in the Mississippi River Basin.

- **Open House/Workshops:** Open house/workshops are tried-and-true mechanisms particularly conducive to providing information and fostering discussions in which questions can be answered, opinions heard and suggestions recorded. They can be held in large venues where many people can attend at once such as high school gymnasiums. They can be scheduled at times that are convenient for work and family schedules. Areas of the room dedicated to specific topics allow participants to learn about and engage with Study personnel about the areas of the Study that interest them the most. Handouts, such as fact sheets or FAQs, are easy to distribute in such a setting, giving people basic and updated information as well as links to websites if they want additional information. If open houses or workshops are held in the same locations on a periodic basis attendees have the opportunity for cumulative learning and expression of their opinions as the Study evolves. One key attribute that appeals to some about open houses or workshops is that they are inclusive; that is, everyone is welcome to attend. The challenge cited by some is that, given the vast geography of the Basin, it is difficult to provide meetings that are convenient to all.
- **Focus groups:** Osprey facilitated nine focus groups during the course of this assessment. Without exception they were conducted in a respectful and informative manner. At the end of each, members of the public were offered the opportunity to comment on what they had heard or anything else on their minds. As with the open houses or workshops mentioned above, if the focus groups are scheduled in the same locations and on a recurring schedule, citizens who are interested could track the evolution of the Study over time and be involved throughout. Such focus groups, or portions of them, could be organized to get reactions to options or proposals, the traditional use of focus groups. Focus groups could be structured to include anyone interested in the Study or for invited participants. Issuing invitations, however, is seen by some as exclusionary and may result in criticism about the candidate pool and how invitees were selected.
- **Technical working group:** A good way to involve people with particular expertise about Study topics is through the establishment of technical working groups. These could be set up in a number of ways and for a variety of purposes. They have the potential to integrate local knowledge with technical expertise that might be provided by consultants. An option mentioned by some is the idea of having working groups that focus on each of the authorized purposes.
- **Surveys:** A simple electronic survey was valuable in the conduct of this Situation Assessment. Using readily available technology, the Osprey Group was able to compile responses from well over 500 people. Many organizations are using this



electronic survey approach to generate timely feedback from various audiences. Results from the Osprey survey are presented in Appendix E. Such a technique could be useful as the Study proceeds. It has the advantage of being open to anyone with access to a computer. The challenge is to inform people broadly about its availability and to recognize its statistical limitations.

## COLLABORATE



The root concept behind the word “collaborate” is co-labor, people laboring together in a common effort. Collaboration is clearly the most difficult portion of the inform-involve-collaborate triangle, especially in the contentious Missouri River context described in Section III. In the words of an early interviewee, “People are already putting on their armor, getting ready for a fight.” Another reinforced the military reference by saying simply, “This is water war.” As has been pointed out, however, others hold out hope and believe that collaboration is essential. In the words of one, “Three words: openness, transparency and collaboration.”

Osprey’s working definition of collaboration involves people working together, exchanging information and perspectives, seeking understanding, and working toward common goals. Collaboration is useful, whether or not the intent is to formalize agreements or arrive at decisions. Collaboration may or may not involve an explicit consensus process. Osprey has concluded that collaboration is essential to maximize the possible positive results of the Study. Under “collaboration” we offer two models as potentially viable: consensus groups and dialogue groups.

### Consensus Groups

Nationwide, there are a number of examples of consensus groups that have produced recommendations around which there was complete consensus within the group. In the Basin, the Missouri River Recovery Implementation Committee (MRRIC) is an example of an ongoing group that operates by consensus.





In general, consensus groups have these characteristics:

- They use a functional definition of “consensus” that involves everyone in a group being able to “live with” the recommendations under consideration; consensus is only reached when everyone reaches that level.
- When conducted successfully they build trust among group members who work together to accurately understand and incorporate each other’s interests – to jointly seek new solutions that go beyond “win-lose.”
- Because of all the care taken to reach consensus, their decisions tend to be implementable, attracting a minimum of opposition.
- They frequently have slow start-up phases as groups deal with the details of membership, clarifying their charge, specifying decision-making procedures, formulating their subcommittee structure, determining their outreach strategy, and identifying their leadership and operating procedures.
- They tend to be time consuming because of the thorough discussion, consideration of options and deliberation necessary to build and arrive at consensus.
- They often have difficulty making hard choices. The objections of one or two people, if not overcome, can cause a group to fall short of consensus.
- They are conducive to comprehensive involvement by the full range of affected interests.
- For a consensus process to succeed, all parties need to work together in good faith to produce and adopt consensus recommendations.

In this situation, the product of the Study is a report to Congress. In the words of one person we interviewed, “There is the perception that this Study will only have a ten percent impact on the final outcome, the rest is political.” While this might well be an overstatement, it reflects what many believe; namely, that the politics of this effort will prove to be more important than the analytical part of the Study because any changes to the authorized purposes would need to be made by the U.S. Congress.

Because of the political environment in the Missouri River Basin, some believe that, regardless of the difficulty, building actual consensus is the only way to generate supportable and lasting recommendations. Some of these people told us that only consensus decisions are likely to constructively influence the ultimate Congressional action. Others see this same political environment and believe that reaching consensus decisions would be impossible.



## Dialogue Groups

A dialogue group provides a collaborative alternative to the consensus model and might address several of the drawbacks noted above. Participants in our Assessment made a number of comments that might point to a dialogue group option:

Comments Related to Dialogue Group Option
<ul style="list-style-type: none"><li>• “Get groups to come together on the Missouri as they have on the Mississippi.”</li><li>• “Any group bigger than 12 won’t get results.”</li><li>• “Interests on the Mississippi far outweigh the interests from Wyoming.”</li><li>• “Collaboration within states can happen, but throughout the Basin is tough.”</li><li>• “Work with the governors of the states.”</li></ul>



The underlying concept behind a dialogue group is that the decision maker convenes a small high-level group of executives on a particular topic. As shown in Appendix G, groups of this type are common. In this case, the purpose of the group would be to provide a venue for ongoing high-level dialogue with and counsel to the Corps about the Study. The Corps of Engineers must retain responsibility for the Study’s implementation and recommendations to Congress. A dialogue group could help ensure that the Corps better understands the perspectives of different interests, areas of agreement and disagreement, and the level of agreement and disagreement. The group would not be a decision-making body. Its members would participate as knowledgeable and experienced individuals. Votes would never be taken. The ongoing counsel that the Corps could receive from such a group could help it formulate its report to Congress that would be much stronger than if formulated without such in-depth discussion and counsel from the group’s members. The members of the group would also gain the advantage of understanding the balancing contained in the Corps’ final Study recommendations, which might enhance political support and minimize opposition.

Convening such a group and the ongoing involvement of Corps leadership would likely produce both a better-informed and a better-understood analysis. The basic framework of such a group might be:



### Study Dialogue Group: A Basic Framework

- The Corps convenes the group
- Governors are asked to appoint one senior government employee per state
- Corps senior leadership participates directly
- The Corps is open and responsive to the group's input and explains its decisions

This model assumes a parallel or integrated Tribal committee, depending upon Tribal preferences.

Operating assumptions about such a group that would contribute to the likelihood of its success are:

### Study Dialogue Group: Operating Assumptions

- The group provides guidance and counsel to the Corps
- Votes are never taken
- The group is not a decision-making body
- Members participate as knowledgeable and experienced individuals
- The group is initiated early in the Study process
- The group is small enough to be efficient
- Government employees constitute the core membership because, by virtue of having statewide responsibilities, they bring broad statewide perspectives to the table
- Executive-level Corps involvement
- Commitment from the states to participate
- All meetings are open to the public

There are a variety of variables to be considered in the basic framework described above. Each has pros and cons as well as resource implications. Some are obviously mutually exclusive. Some could be additive. The major alternative approaches we consider as possibilities are:



### Study Dialogue Group: Alternative Approaches

- Governors appoint two state government employees rather than one (e.g., the State Engineer or Director of the Department of Natural Resources or Director of Economic Planning)
- Corps senior leadership alternatives: Division (military or civilian) or the Omaha and Kansas City Districts (military or civilian)
- Include representatives from the Mississippi River Basin
- States set up parallel processes to hear from their citizens so that citizens' perspectives are part of what their representative(s) bring to the table
- Governors have discretion to appoint non-governmental individuals
- Provide professional neutral facilitation
- Appointees to the group select one additional representative for each of the eight authorized purposes
- Group could assist in identifying individuals to help staff or review technical work products
- Whether Tribal representatives are included within the group at the outset or whether a parallel and equal structure is set up for the Tribes. This Tribal group might or might not merge with the parallel non-Tribal structure over time.
- Include representatives from other pertinent Federal agencies (e.g., EPA, USFWS, BOR, WAPA)
- The group could have some level of responsibility for forming and coordinating issue task groups

In general, dialogue groups have these characteristics:

- They may be small and efficient in terms of time required for start-up and ongoing deliberation
- Discussion and decision making may be streamlined
- They are conducive to working in compressed time frames
- Members may be selected because they understand and are able to speak for several interests
- If appointed by political leaders the appointees bring with them political accountability
- They often establish mechanisms such as subcommittees or input sessions to involve or hear the perspectives of various interests
- To the extent that they have candid dialogue in the presence of decision makers they can help the decision makers tackle tough issues



- Decision makers preserve their legal authority, but are responsive to the input and counsel of the group's individual members

### Tribal Dialogue Group

Based on introductory conversations with Tribal members, there is an apparent desire for the Tribes to be involved and engaged in the Authorized Purposes Study. Discussions between the Osprey Group and Tribes will be ongoing during the months of April and May, so the recommendations below are more of a work-in-progress than is the case with the other recommendations. Osprey's final recommendations for Tribal collaboration will be submitted in June as an addendum to this Assessment. Some of the “inform” and “involve” techniques explained above might be requested by and are clearly applicable to Tribes. The concept of “collaborate” with the Tribes requires and is receiving further exploration.

### Joint State-Tribal Dialogue Group

One option is that Tribal representatives could be included in the group from the outset. Another option is for the Tribes to have their own group. Because discussions with the Tribes are ongoing, Osprey is reserving judgment on these options or perhaps a hybrid where the Tribes begin independently and then are subsequently merged with the Dialogue Group. This issue will be addressed as an addendum to this report.

### Existing Collaborative Groups

A number of people suggested that this Study rely on existing groups rather than create a new entity. Such groups commonly include dedicated and knowledgeable individuals who spend significant amounts of time hearing each other's perspectives and trying to arrive at common ground and workable solutions. MRRIC and MoRAST were frequently mentioned as existing possibilities. We heard, however, that both have positive and negative attributes in terms of their potential usefulness for the Authorized Purposes Study. Congress formed MRRIC with a specific charge related to recovering implementation. MoRAST is an association of states and Tribes in which one key state, Missouri, is not a member. Both groups have supporters and critics throughout the Basin. We believe these limitations are significant enough that neither of these forums should be the group to guide the Study's implementation. Even so, there should be ongoing communication and coordination about the Study and its progress with both groups.

### The Federal Advisory Committee Act (FACA)

In considering the choice of a dialogue group or consensus group, the Corps will need to decide how the requirements of FACA might apply. Key factors include whether the Corps is convening the group, whether the Corps identifies specific participants, whether the Corps would control or manage the group, whether the group seeks consensus



decisions or individual suggestions from the group's members, and whether there are non-governmental representatives in the group. We believe the kind of dialogue group we will recommend in Section V is consistent with the goals and principles of FACA, but does not trigger the specific requirements of that law. We also believe the Corps, after considering FACA implications, should design any committee for maximum functionality. Detailed information about the factors regarding FACA that need to be considered is provided in Appendix H.

### Summary

Over the course of this Assessment, almost everyone with whom we spoke emphasized the importance of effective public engagement, although there is broad disagreement on how this should be accomplished. Our analysis considered numerous techniques and chose a subset of these as viable alternatives in three distinct categories: inform, involve and collaborate. The following section articulates specific recommendations in each of these three categories.



## V. RECOMMENDATIONS

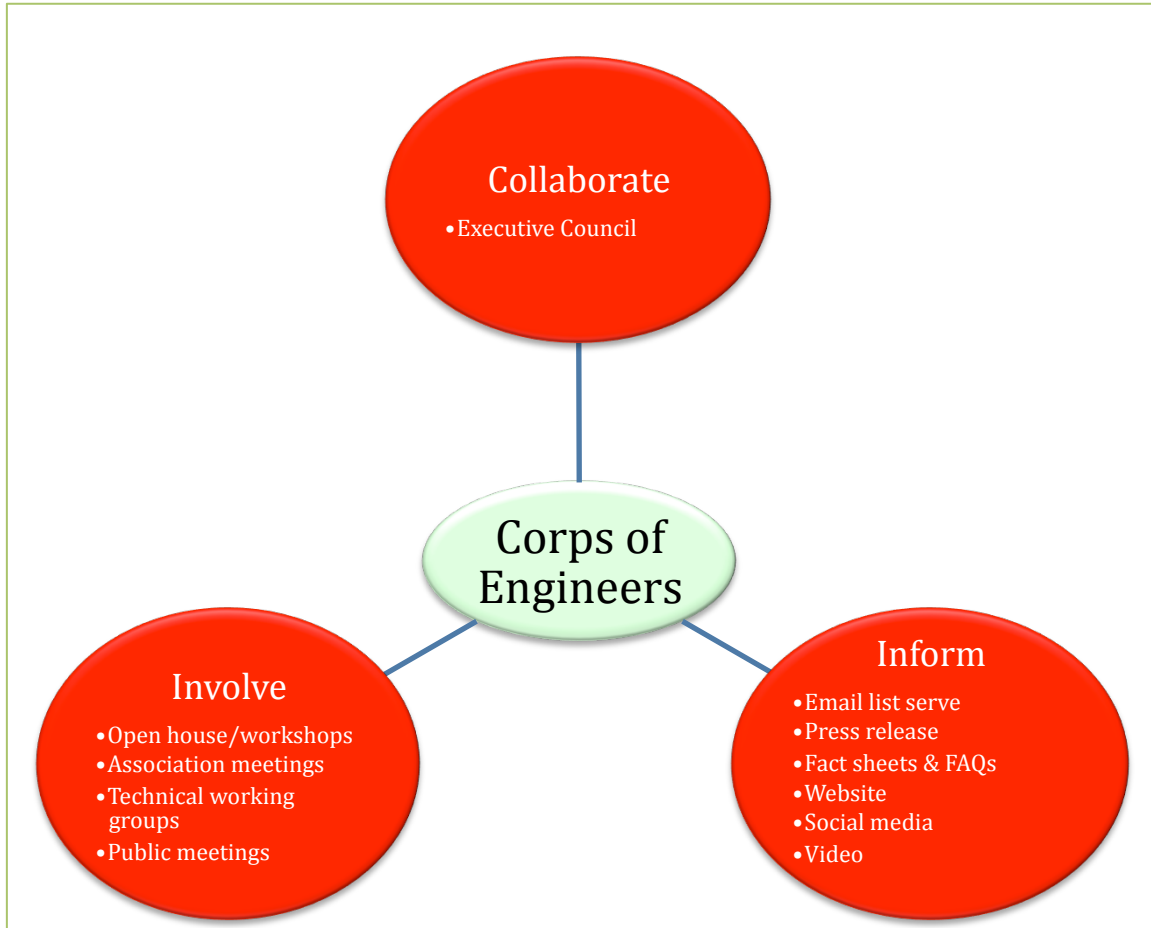
The recommendations of the Osprey Group resulted from the information and insights received from the assessment interviews, focus groups, introductory meetings with Tribal representatives and public comment. Our preliminary findings and recommendations were shared publicly in St. Joseph, Missouri, Bismarck, North Dakota, and online in early March 2010 and have been refined based on comments received through March 26, 2010.

We recommend a combination of activities that will simultaneously inform, involve and enhance the Corps' collaboration with the public and Tribal governments throughout the Missouri River Basin. The Corps of Engineers will be responsible for this outreach and it will need to determine which of these approaches it believes will prove beneficial. A key variable in its calculus should be careful appreciation of the challenging context in which the Authorized Purposes Study will be conducted.

The recommended public involvement activities are reflected in the following graphic. With the exception of those that fall under "Collaborate," the recommendations are suitable for both Tribes and the public. It will be important that the public and Tribes understand the various processes the Corps selects and their roles in them.

Osprey will refine its analysis of alternatives for Tribal engagement during its ongoing meetings with Tribes. The result will be provided in an addendum to this report (Appendix J) that will be issued in June 2010.





## INFORM

Osprey recommends that the Corps select and begin early deployment of the options it considers most effective from the “Inform” category.

The backbone of the Corps’ effort should be the frequent use of an email list serve. Anyone should be able to add his/her email address to this list. Email addresses of interested people should be gathered at all upcoming scoping meetings and electronically through the existing Corps and, as appropriate, USIECR project websites.

In addition to an email list serve, the Corps should use both traditional and newly evolving forms of informing people such as press releases, fact sheets and FAQs, an MRAPS website, video and electronic social media, such as Facebook.





## INVOLVE

A wide variety of approaches may be used to provide interactivity with the public and move from one-way to two-way communication. Osprey particularly recommends four techniques from the menu of viable options available to involve citizens in the Authorized Purposes Study: open house/workshops, association meetings, technical working groups, and traditional public meetings.

- Open house/workshops are effective ways to involve citizens during the course of the study. During the EIS scoping period the Corps will have the opportunity to use formats that could prove useful later in structuring and scheduling open house/workshops.
- Association meetings are ongoing. Chosen carefully, they offer an efficient venue and ongoing opportunities to provide continuity in involving interested citizens in the Study over the next several years.
- Technical working groups are good ways to make use of substantive expertise regarding the authorized purposes. They could be formed as part of a dialogue group or convened independently by the Corps. Regardless they are likely to focus on specific areas of expertise or issues of concern. If independent of a dialogue group, efforts should be made to have technical working groups share their evaluations with the group.
- Additional public meetings where everyone is given the opportunity to be heard provide a useful venue to gather broad public input.

## COLLABORATE

We introduced two approaches for Collaborate in the previous section: consensus and dialogue groups.

For the reasons below, Osprey does not recommend a consensus process for the Authorized Purposes Study:

- Serious divisions exist in the Basin about the Congressionally-defined scope of the Study and the Corps' decision to pursue an EIS. These divisions would, at a minimum, greatly delay the launching of a consensus-based effort.
- A consensus effort would require the expenditure of significant additional resources, including volunteer and professional time, when many are already complaining about "study fatigue."
- This Study covers vast geographic and substantive territory. Its complexity and scope makes a consensus process difficult.
- There is deep-seated conflict and strong positional advocacy about the numerous issues in the Basin.



For these reasons, although thoroughly examined as a possible approach, we conclude that a pure consensus decision-making model is inappropriate for this Study. We believe, however, that dialogue groups as outlined below offer many of the advantages and have, in this context, fewer downsides than consensus groups.

Osprey believes that a dialogue group, along the lines of what is described in Section IV, could greatly enhance the efficient conduct of the Study and the understanding, strength and acceptance of its final recommendations. We also believe that unless there is a venue provided for good-faith collaboration there is significant risk of increasing vocal polarization.

We call the proposed dialogue group an Executive Council. Among the key operating assumptions of this Executive Council are:

- Corps senior leadership participates directly
- The Corps provides information and its perspectives to the Council
- The Council provides guidance and counsel to the Corps
- Members participate as knowledgeable and experienced individuals
- The group is not a decision-making body
- Votes are never taken

Osprey discovered and described numerous challenges that would need to be overcome for an Executive Council to succeed. One challenge involves the Corps' interest, willingness and ability to create such an Executive Council in a timely way and sustain it over time. There are also challenges associated with ensuring non-governmental voices are heard in this process<sup>5</sup>.

We consider the “Inform” and “Involve” components fundamental to a public engagement strategy, and “Collaborate” important but discretionary. While we believe an Executive Council as outlined would be valuable to the Study process, we recognize that it is the Corps' decision about whether to collaborate through the use of such a Council.

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<sup>5</sup> There are several ways these concerns might be addressed. For example, in Iowa various state interests are identified through an inter-agency group that incorporates natural resources, agriculture, utility, transportation and economic development perspectives. States could establish groups similar to Iowa's to advise the governor-appointed state representative and serve not only as a means of gathering input, but also as an important ongoing communication and advisory vehicle for the state representatives on the Council.



If pursued, Osprey recommends the Executive Council with:

- Corps senior leadership participating in person
- Missouri River Basin governors invited to appoint a single state employee
- Pertinent federal agencies (for example, EPA, USFWS, BOR and WAPA) asked to appoint one representative each
- Two government representatives invited from the Mississippi River Basin

With this model, the Corps would work with an Executive Council of about 15 individuals.

This Council should meet early and perhaps with greater frequency at the beginning of the Study period. The goal would be to produce understanding and a strong sense of accord between the Corps and the Council. The group would offer constructive insights and counsel, but the Corps will have ultimate decision-making authority. The Corps would be responsive to the Council, share information to enhance the collective understanding of the group and be clear about fundamental policy choices it makes in conducting the overall Study.



## **APPENDIX A**

### **LIST OF INTERVIEWEES**

Bret Afdahl  
South Dakota Walleyes Unlimited

Byron Almquist  
Canoe and Trail Adventures

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Bill Beacom  
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Jim Berkeley  
Environmental Protection Agency

Don Borgman  
John Deere

Pat Cassidy  
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Jeff Chapman  
Kinder Morgan

Steve Chick  
Natural Resources Conservation Service

Amy Christensen  
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Doug Clark  
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Dean Crist  
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Margaret Fast  
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Terry Fleck  
Friends of Lake Sakakawea

John Fleig  
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Dale Frink  
North Dakota State Water Commission

Dan Fritz  
Bureau of Reclamation

Lance Gaebe  
Office of North Dakota  
Governor John Hoeven

Joe Gibbs  
Farmer, Missouri

Dale Gloe  
Farmer, Missouri

Tom Graves  
Mid-West Electric Consumers  
Association



Kristian Gustavson  
Below the Surface

Chris Hesla  
South Dakota Wildlife Federation

Joey Hockett  
South Dakota Office of Tourism

Harold Hommes  
Iowa Department of Agriculture and  
Land Stewardship

Bernie Hoyer  
Iowa Department of Natural Resources

Marilyn Hudson  
Three Affiliated Tribes of the Fort  
Berthold Reservation

Andrea Hunter  
Osage Nation

Bill Jackson  
AGRIServices of Brunswick L.L.C

Denise Jensen  
Winnebago Tribe of Nebraska

Steve Johansen  
Farmer, Nebraska

Carl Johnson  
Missouri River Basin Watershed  
Restoration and Protection Strategies  
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Sam Johnson  
Missouri Levee and Drainage District  
Association

Karen Kern  
Great Lakes of South Dakota Tourism  
Association

Mark Kist  
Small Business Owner

Rod Leisinger  
Sheridan County

Paul Lepisto  
Izaak Walton League

Mike Linn  
Nox-Crete Products Group

Sue Lowry  
Wyoming State Engineers Office

Marian Maas  
Nebraska Wildlife Federation

Michael Mac  
U.S. Geological Survey

Henry Maddux  
U.S. Fish and Wildlife Service

Deb Madison  
Fort Peck Assiniboine and Sioux Tribes

Vicki Marquis  
Missouri River Conservation Districts  
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Mary Massad  
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Buzz Mattelin  
Farmer, Montana

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City of Leavenworth Public Works

Cheri Miller  
Wyandotte County Conservation District



Michael J. Monahan  
Excell Marine Corporation

Lee Moore  
The Nature Conservancy

Lynn Muench  
American Waterways Operators

Paul Neil  
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Mike Olson  
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Roger Otstot  
Bureau of Reclamation

Stan Peterson  
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Jason Skold  
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Chad Smith  
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Phyllis Young  
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Allottees Association



## **APPENDIX B**

### **LIST OF FOCUS GROUP PARTICIPANTS**

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WaterOne

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Wade Bachmeier  
Morton County Water Resource District

Clif Baumer  
Natural Resources Conservation Service

Ron Blakley  
Missouri-Arkansas Basins Association  
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Rob Bourgeois  
Louisiana Department of Wildlife and  
Fisheries

Timothy Bryggman  
Montana Department of Natural  
Resources & Conservation

Mike Bush  
St. Louis Confluence River Keeper

Dan Cassidy  
Missouri Farm Bureau

Noel Challis  
Platte County, MO

John Cooper  
Former Chair, Missouri River  
Association of States and Tribes  
(MoRAST)

Glenn Cox  
Mississippi River Corridor

Jerry Daugherty  
St. Charles County Council Member for  
District 6

Aaron DeLonay  
U.S. Geological Survey

Mareal Denning  
Private Citizen

Harold Draper  
Private Citizen

Mike Dwyer  
North Dakota Water Users Association

Angela Ehlers  
South Dakota Association of  
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Bruce Engelhardt  
North Dakota State Water Commission

Joe Engeln  
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Steve Engemann  
Hermann Sand & Gravel, Inc.





Garland Erbele  
South Dakota Department of  
Environment and Natural Resources

Dave Fryda  
North Dakota Game and Fish

Bob Fuerman  
Missouri American Water

Keith Garrison  
Arkansas Waterways Commission

Steve Gaul  
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Kyle Graham  
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Kevin Knepper  
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Mitch Leachman  
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Commission

Jim Monroe  
Louisiana Farm Bureau



Jessica Montana  
Iowa Department of Economic  
Development

Terry Moore  
AEP River Operations

Steve Murray  
Missouri American Water

Richard Nelson  
U.S. Bureau of Reclamation

Wayne Nelson-Stastny  
U.S. Fish & Wildlife Service

John Ostlund  
County Commissioner, Yellowstone  
County

Ernest B. Perry  
Missouri Department of Transportation

Don Pfau  
Fort Peck Advisory Committee

Franklyn Pogge  
Missouri-Arkansas Basins Association  
(MO-ARK)

Glenn Pollock  
Sierra Club

Mark Porath  
American Fisheries Society-North  
Central Division

John Pozzo  
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Greg Rauschendorfer  
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Missouri River Relief

Paul C. Rohde  
Waterways Council, Inc.

Nicole Rolf  
Montana Farm Bureau

Matt Rota  
Gulf Restoration Network

Elisa Royce  
American Land Conservancy

Joe Royer  
Outdoors, Inc.

Ken Royse  
Missouri River Joint Water Board

Mike Ruggles  
Montana Fish, Wildlife & Parks

John Ruskey  
Quapaw Canoe Company

Julia Sage  
Ponca Tribe of Nebraska

Al Sapa  
North Dakota Chapter, The Wildlife  
Society

Steve Schnarr  
Missouri River Relief

David Sieck  
Iowa Corn Growers Association



Vic Simmons  
Rush Electric

Mark Sattelberg  
U.S. Fish and Wildlife Service

Mike Sobetski  
Business Owner

Harry Stiles  
Walleyes Unlimited

David Storvick  
Columbia Water and Light

Henry Sullivan  
Port of South Louisiana

Jody Sundsted  
Western Area Power Administration  
(WAPA)

Rob Todd  
Tennessee Wildlife Resources Agency

Gene Veeder  
McKenzie County Economic  
Development

Jerry Wegner  
Former Engineer, Western Area Power  
Administration (WAPA)

Larry Weiss  
Missouri Sedimentation Action  
Coalition

Dan Wiley  
National Park Service

Burt Williams  
The Nature Conservancy

Lyle Witham  
Basin Electric Power Cooperative

Jason Yates  
Harvest Initiative

Gene Zuerlein  
Nebraska Game and Parks Commission

Mark Zurbrick  
Missouri Chapter of the American  
Fisheries Society



## APPENDIX C

### INTERVIEW AND FOCUS GROUP PARTICIPATION BY STATE

Personal Interviews and Focus Group Participants by State		
State	Personal Interviews	Focus Group Participants
Colorado	3	0
Iowa	8	4
Kansas	8	3
Missouri	15	32
Montana	8	11
Nebraska	10	6
North Dakota	7	10
South Dakota	11	9
Wyoming	5	0
Others	7	15
Total	82	90



## APPENDIX D

### STATISTICS FROM THE PERSONAL INTERVIEWS

The personal interviews were semi-structured and relied on an interview guide. Most of the questions were open-ended and allowed for qualitative responses. There were a limited number of quantitative questions that provided some statistical data. These data are summarized below.<sup>6</sup>

1. Rating of Purposes (on a scale of 1 to 10, where 10 indicates extremely important)

Weighted Average Rating of Eight Purposes	
Purpose	Rating
Flood risk management	8.9
Water supply	8.7
Water quality	8.4
Power generation	8.2
Fish & wildlife habitat	7.2
Recreation	6.6
Irrigation	5.7
Navigation	5.2

2. Are there changes needed in how the Corps manages the system?

Yes	83.8%
No	7.4
Don't know or not sure	<u>8.8</u>
Total	100.0%

3. How would you characterize the extent of the change needed?

Major	47.4%
Moderate	19.3
Incremental or minimal	29.8
Don't know or not sure	3.5
Total	100.0%

---

<sup>6</sup> Based on 82 personal interviews. Most, but not all interviewees, responded to all statistical questions.



## APPENDIX E

### STATISTICS FROM THE ELECTRONIC SURVEY

The electronic survey used a Survey Monkey instrument. It was a short survey and asked primarily for quantitative information. One question was open-ended. The statistical data from the survey are shown below.<sup>7</sup>

- Please tell us how you rate the following eight purposes -- on a scale from "not at all important" to "extremely important:" (Note: a similar 1 to 10 scale was used with 10 equating to extremely important).

Weighted Average Rating of Eight Purposes	
Purpose	Rating
Water quality	9.0
Water supply	9.0
Fish & wildlife habitat	8.8
Recreation	8.5
Flood risk management	8.2
Power generation	8.1
Irrigation	6.2
Navigation	4.4

- Are there purposes not adequately addressed?

Yes	43.9%
No	22.8
Don't know or not sure	<u>33.3</u>
Total	100.0%

- Are changes needed in how the Corps of Engineers manages the Missouri River system?

Yes	82.7%
No	6.6

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<sup>7</sup> Based on 520 surveys partially or completed filled out through April 9, 2010.



Don't know or not sure	<u>10.6</u>
Total	99.9%

4. How would you describe the changes needed in how the Corps manages the Missouri River system?

Major change is needed	38.8%
Moderate change is needed	45.7
Incremental or minimal change is needed	10.6
No change is needed	<u>4.9</u>
Total	100.0%



## APPENDIX F

### ADDITIONAL CONTEXTUAL ISSUES

Several key contextual issues were described early in the report. Other issues were mentioned during the course of this assessment as well. They did not rise to the prominence of the key contextual issues highlighted in Section III, but are also indicative of aspects of a difficult contextual environment.

These include:

- Perception of a zero-sum game
- Population distribution
- Water law legal frameworks
- Other elements of the Study context

Each is described in the following paragraphs:

#### Perception of a Zero-Sum Game

There is a strong sense throughout the Basin that this is a zero-sum game. That is, if you win, I lose. This perception has been underscored in years of drought when water resources were stretched and hard water allocation choices were made. While there is the countervailing view to this zero-sum game thinking, it seems to be in the minority. Without having a sense that the varied purposes can be simultaneously optimized or even enhanced, there is little opportunity for building true consensus for a preferred water allocation strategy in the Basin. Examples of comments from participants are shown below:

#### Comments About Allocation of Water Resources

- “The underlying problem is that there is not enough water in the river to cover all the purposes.”
- “We have all been winners in some respects and losers in some respects.”
- “The key nut that needs to be cracked is what to do when the water resources are very limited.”
- “We should focus on enhancing each use.”
- “If everyone comes to the table protecting their interests at all costs, you cannot have a meaningful process in the end.”





While the thought about enhancing uses and enjoying the proverbial “win-win” has appeal, it will prove challenging. Osprey found few individuals willing or able to think about how to address competing water needs concurrently and effectively. Some offered thoughts about how seasonal demands for water might be modified, or how water reuse might be possible, or how water pricing might reduce demand, but such suggestions were few. Most see the challenge as being one of allocating a fixed resource.

The importance of the River is seen by many from their particular geographic or interest perspective. While some stressed the importance for this analysis to examine the entire system, it is difficult to see and appreciate the impact on so many interests over such a massive area. There are few who speak with a Basin-wide perspective.

### Population Distribution

Some believe that there should be a preference for purposes that benefit the most people. As Senator Kit Bond said, focus on where the “majority of users” live. This was a common refrain from those who live in Missouri.

Some comments about population are:

Comments Related to Population Distribution in the Basin
<ul style="list-style-type: none"><li>• “Population is driving this thing.”</li><li>• “The State of Missouri needs to take a hit on this one.”</li><li>• “Upstream there are a bunch of cry babies that are always complaining about water.”</li><li>• “This Study appears to be a railroad job that will benefit the few in the upper Basin at the loss of the many in the lower Basin.”</li><li>• “The situation will only get worse, not better, because it will be a political solution.”</li></ul>



Missouri is the most populous state in the Basin. Some interviewees stated that Missouri has more people than the rest of the Basin states combined. The Basin includes all or parts of ten states. Most often, however, nine states are considered to be in the Basin. The Basin states, which are wholly or partially within the Basin, in order from the most populated to the least populated, are:



Population of States Wholly or Partially Within the Missouri River Basin		
State	Population <sup>8</sup>	Percent
Missouri	5.8 million	28%
Colorado	4.8 million	23%
Iowa	3.0 million	14%
Kansas	2.8 million	13%
Nebraska	1.8 million	8%
Montana	0.9 million	5%
South Dakota	0.8 million	4%
North Dakota	0.6 million	3%
Wyoming	0.5 million	2%

Missouri is the most populated state in the Basin and the management of the river has a major impact on its citizens and economy. Other states do not have the population of Missouri, but experience similar impacts from the river. Certain other states have a more limited impact from the river even though they may have sizeable populations.

#### Water Law Legal Frameworks

For some, and it should be said this is a minority of those with whom we spoke, the competing legal frameworks are a problem.

Water is generally allocated using two distinctly different legal frameworks:

- The upper-basin states allocate water under the prior appropriation system. This system varies state to state, but the general principle is that water rights are unconnected to land ownership and can be bought and sold. The first person to use a quantity of water from a water source for a beneficial use has the right to continue to use that quantity of water for that purpose. Subsequent or junior users can use the remaining water for their own beneficial purposes provided that they do not impinge on the rights of previous or senior users.

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<sup>8</sup> 2006 estimates from the US Bureau of the Census. These population estimates are for the entire states rather than just the portion of the state that resides within the Basin.



- The lower-basin states rely on the riparian system to allocated water. Under the riparian principle, all landowners whose property is adjacent to a body of water have the right to make reasonable use of it. If there is not enough water to satisfy all users, allotments are generally fixed in proportion to frontage on the water source. These rights cannot be sold or transferred other than with the adjoining land, and water cannot be transferred out of the watershed.

We heard only limited concern about these contrasting legal frameworks, but it did come up and, when it did, there were vehement opinions about the efficacy of one system over the other. The O'Mahoney-Millikin amendment came up with one focus group noting that it guarantees consumptive beneficial uses west of the 98<sup>th</sup> meridian. In another focus group, a member of the public offered comments that cited the dire consequences of using the prior appropriations doctrine, primarily because water can be bought and sold and even moved out of the Basin. These legal concerns are generally seen as fairly esoteric and not of general concern to most people with whom we spoke.

### Other Elements of the Study Context

The Corps faces a challenging environment in which it must conduct the Study for reasons beyond those cited above. This is an environment of parochial interests, confusion, frustration and fatigue.

Unfortunately, there is a good deal occurring in the Basin that creates confusion and complexity. The various “mister” efforts are cited frequently. Some ask: Why would the Corps pursue another Study while these efforts are just beginning and, to some, showing promise about building trust and openness? Others are quick to point out that the Corps did not ask for this Study and does not have the option of not doing the Study. Even the prevalent use of “MR” acronyms adds to a sense of confusion.

We also heard a number of comments that reflect continued confusion or differences of opinion about the Study itself. These included questions about the need for an Environmental Impact Statement, whether the Study should be limited to the Missouri River Basin or include impacts beyond the Basin, and the role of the Bureau of Reclamation and the tributaries to the Missouri River.

Some see this Study as duplicative of the Master Manual process, a lengthy and onerous process itself. Others see this as a totally different effort and the most significant water allocation review to be conducted since the original passage of the 1944 Flood Control Act.

There is also a significant element of study fatigue or as some call it: “MR fatigue.” For some this is a limitation on resources. How many studies can we meaningfully be involved in? This is a concern expressed by Tribal members, but others as well. Yet there is the more dominant view that while efforts like MRRIC are meritorious in some



ways, the Authorized Purposes Study has much greater potential to impact users in the Basin. This suggests that citizens will want and need to be involved because of the perceived importance of this effort and the potential for Study recommendations to impact how the River is operated.

There are also concerns about the timing of the Study. A number of people fear that an unwavering commitment by the Corps to conduct the Study in a predetermined timeframe might compromise public engagement. Despite study fatigue, most believe that conducting a Study that is objective, thorough and credible is more important than completing the Study within an established time frame.



## **APPENDIX G**

### **EXAMPLES OF COLLABORATIVE EFFORTS**

Various federal agencies, including the Corps, have established and used steering councils or similar executive groups successfully. Significant among these are

#### COMBINED STRUCTURAL AND OPERATING PLAN ADVISORY TEAM

“The Combined Structural and Operating Plan (CSOP) Advisory Team was chartered in October 2003 to assist the South Florida Ecosystem Restoration Task Force (Task Force) in providing recommendations to the U.S. Army Corps of Engineers during key phases in the development of the CSOP. The CSOP is the combined operating schedule for two critical Everglades restoration projects, the Modified Water Deliveries project and the C-111 project. . . . The Team consisted of voting members representing stakeholder interests of residents, recreation, the environment and agriculture; and non-voting members representing federal, state, local and tribal entities. It is assisted by neutral facilitators. . . . The duty of the CSOP Advisory Team was to provide consensus recommendations to the Task Force at key points during the development of the CSOP.”

Citation: [http://www.sfrestore.org/issueteams/csop\\_advisory\\_team/index\\_.html](http://www.sfrestore.org/issueteams/csop_advisory_team/index_.html)

#### PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM

“Efforts to relicense Kingsley Dam on the North Platte River in western Nebraska, the presence of threatened and endangered species, and the U.S. Fish and Wildlife Service’s 1994 Biological Opinion on Platte River operations provided the backdrop for conflict over the Platte’s vital water. Rather than engage in years of courtroom battles over limited water supplies and individual river species, the governors of the three Basin states joined with the Secretary of Interior in July 1997 to sign the “Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitat along the Central Platte River, Nebraska.

As a part of the Cooperative Agreement, a Governance Committee (GC) was formed to lead the negotiation process. The GC consisted of representatives of the three Basin states; the Bureau of Reclamation; the Fish and Wildlife Service; water users from each of the three Basin states; and environmental groups. The work of the GC concluded in early 2006 with a Final Program Document containing direction for all key elements necessary to implement a program to manage land and water resources to provide benefits for four “target species” on the river in Nebraska: the endangered whooping crane, interior least tern and pallid sturgeon, and the threatened piping plover. The Secretary of Interior and the governors of Colorado, Wyoming and Nebraska



all signed the Final Program Agreement and the program commenced on January 1, 2007.”

Citation: <http://platteriverprogram.org/default.aspx>

### THE LOWER COLORADO RIVER MULTI-SPECIES CONSERVATION PROGRAM (MCSP)

The MSCP “is a coordinated, comprehensive, long-term multi-agency effort to conserve and work towards the recovery of endangered species, and protect and maintain wildlife habitat on the lower Colorado River. . . . The MSCP’s purposes are:

- protect the lower Colorado River environment while ensuring the certainty of existing river water and power operations,
- address the needs of threatened and endangered wildlife under the Endangered Species Act, and
- reduce the likelihood of listing additional species along the lower Colorado River.

“The Lower Colorado River Multi-Species Conservation Program Steering Committee is an unincorporated association of water and power users, and others participating in the development and implementation of the LCR MSCP. The Committee works with the Program Manager (from the Bureau of Reclamation) to coordinate implementation of the program, and reviews certain matters and actions presented by the Manager, including those related to annual work plans, budgets, land and water acquisitions, and reports and responses to Congress and Federal and state regulatory agencies.”

The membership of the Steering Committee may be found at <http://www.lcrmscp.gov/steeringcmte/VotingMembers.pdf>. The Committee consists of representatives from several federal agencies and states, Tribes and conservation interests.

Citation: <http://www.lcrmscp.gov/>



## **APPENDIX H**

### **FEDERAL ADVISORY COMMITTEE ACT (FACA) APPLICABILITY**

This Appendix contains three documents, which present the factors that determine whether a group or committee such as those described under the heading of “Collaboration” in this report is subject to the Federal Advisory Committee Act (FACA). A careful weighing of these factors will be necessary.

- GSA Federal Advisory Committee Act Brochure
- A “decision tree” from the Bureau of Land Management
- A memo by the General Counsel of the USIECR, dated January 25, 2010

#### **1. GSA FACA BROCHURE**

##### **An Overview**

Advisory committees have played an important role in shaping programs and policies of the federal government from the earliest days of the Republic. Since President George Washington sought the advice of such a committee during the Whiskey Rebellion of 1794, the contributions made by these groups have been impressive and diverse.

Through enactment of the Federal Advisory Committee Act (FACA) of 1972 (Public Law 92-463), the U.S. Congress formally recognized the merits of seeking the advice and assistance of our nation's citizens. At the same time, the Congress also sought to assure that advisory committees:

- Provide advice that is relevant, objective, and open to the public;
- Act promptly to complete their work; and
- Comply with reasonable cost controls and recordkeeping requirements.

##### **Role of Federal Advisory Committees**

With the expertise from advisory committee members, federal officials and the nation have access to information and advice on a broad range of issues affecting federal policies and programs. The public, in return, is afforded an opportunity to participate actively in the federal government's decision-making process.

##### **Federal Agency Responsibility**

Each federal agency that sponsors advisory committees must adhere to the requirements established by the FACA, as well as those administrative guidelines provided by the U.S. General Services Administration's (GSA) Committee Management Secretariat. GSA has



had the responsibility for overseeing the FACA since 1977.

### GSA's Role Under the FACA

With approximately 1,000 advisory committees in existence at any given time, special attention is required to assure compliance with the FACA, the Freedom of Information Act, and related regulations, as well as to encourage effective and efficient use of committee resources.

While executive branch departments and agencies are responsible for continually reviewing committee performance in these areas, the General Services Administration was designated by the President in 1977 to monitor committee activities governmentwide. As part of this responsibility, GSA:

- Conducts annual reviews of advisory committee accomplishments;
- Responds to inquiries from agencies on establishing new committees or the renewal of existing groups;
- Prepares an annual report covering a summary of committee activities; and
- Maintains a FACA database on the worldwide web from which advisory committee information may be obtained via the Internet.

Together, GSA and the federal community work to eliminate the overlap or duplication of advisory bodies, terminate unnecessary or inactive committees, and develop committee management regulations, guidelines, and training in response to requirements of the executive branch and Congress.

### Complying with FACA

Any advisory group, with limited exceptions, that is established or utilized by a federal agency and that has at least one member who is not a federal employee, must comply with the FACA. To find out if a group comes under the FACA, any individual may contact the sponsoring agency's Committee Management Officer, or the GSA Committee Management Secretariat (see the last section "For More Information...").

### Requirements for Establishing and Managing Advisory Committees

Under the Federal Advisory Committee Act, advisory committees can be created only when they are essential to the performance of a duty or responsibility conveyed upon the executive branch by law. Before committees can be set up, high-level officials within the sponsoring agency must review and approve the request. Once a committee is approved, a charter is prepared outlining the committee's mission and specific duties and forwarded to GSA's Committee Management Secretariat for final review. Following a required public notification period, and the filing of the charter with Congress, the committee may begin operation.





### Committee Management Officer and Designated Federal Official

The Federal Advisory Committee Act also provides that each agency sponsoring a federal advisory committee must appoint a Committee Management Officer to oversee the administration of the Act's requirements.

In addition, a designated federal official must be assigned to each committee to:

- Call, attend, and adjourn committee meetings;
- Approve agendas;
- Maintain required records on costs and membership;
- Ensure efficient operations;
- Maintain records for availability to the public; and
- Provide copies of committee reports to the Committee Management Officer for forwarding to the Library of Congress.

### Expiration of a Committee's Charter

Unless the renewal of a committee charter is justified under the FACA, the charter automatically expires after a two-year period (or as otherwise provided by law).

### Advisory Committee Members

Federal advisory committee members are drawn from nearly every occupational and industry group and geographical section of the United States and its territories. The FACA requires that committee memberships be "fairly balanced in terms of the points of view represented and the functions to be performed."

As a result, members of specific committees often have both the expertise and professional skills that parallel the program responsibilities of their sponsoring agencies. In balancing committee memberships, agencies are expected to assure that major-and sometimes strongly opposing-viewpoints are represented to provide a foundation for developing advice and recommendations that are fair and comprehensive.

### Appointing Committee Members

Agency officials, members of Congress, the general public, or professional societies or current and former committee members may nominate potential candidates for membership.

Selection of committee members is made based on the FACA's requirements and the potential member's background and qualifications. Final selection is made by the president or heads of agencies.



Prior to accepting an appointment with a federal advisory committee, each prospective member should meet with the appropriate agency Committee Management Officer and Designated Agency Ethics Official, to discuss duties and obligations, allowable expenses, and compensation limitations.

### Federal Ethics and Conflict of Interest Laws

Agency officials must provide prospective advisory committee members with information regarding any applicable standards of conduct -- including those imposed by federal conflict of interest statutes. In some instances, members may be subject to special limitations during the course of their service on an advisory committee. For some members, these restrictions also may apply (for limited periods) after their committee assignments have ended.

Some agencies may impose additional administrative requirements as well. To avoid potential conflicts, each advisory committee member should assure that he or she receives adequate information from the sponsoring agency and completes any required appointment papers and disclosure forms prior to service on a committee.

Oral briefings and other explanatory material may be obtained through the sponsoring agency's Committee Management Officer, Designated Agency Ethics Official, or from the Office of Government Ethics, which has governmentwide jurisdiction on federal ethics issues.

### Limits on Membership Terms

Each agency sets limits (unless provided by law) on the lengths of terms for serving on advisory committees to allow for continually new membership.

### Open Access to Committee Meetings and Operations

Under the provisions of the Federal Advisory Committee Act, federal agencies sponsoring advisory committees must:

- Arrange meetings for reasonably accessible and convenient locations and times;
- Publish adequate advance notice of meetings in the Federal Register;
- Open advisory committee meetings to the public (with some exceptions-see the section on "Government in the Sunshine Act" below);
- Make available for public inspection, subject to the Freedom of Information Act, papers and records, including detailed minutes of each meeting; and
- Maintain records of expenditures.



## Government in the Sunshine Act

Advisory committee meetings may be closed or partially closed to the public based upon provisions of the Government in the Sunshine Act of 1976 (Public Law 94-409).

Examples of meetings that may be closed under the FACA are:

- Those including discussions of classified information;
- Reviews of proprietary data submitted in support of Federal grant applications; and
- Deliberations involving considerations of personnel privacy.

Today, an average of 1,000 advisory committees with more than 40,000 members advise the President and the Executive Branch on such issues as the disposal of high-level nuclear waste, the depletion of atmospheric ozone, the national fight against Acquired Immune Deficiency Syndrome (AIDS), and on efforts to rid the Nation of illegal drugs or to improve schools, highways, and housing, and on other major programs.

### For More Information...

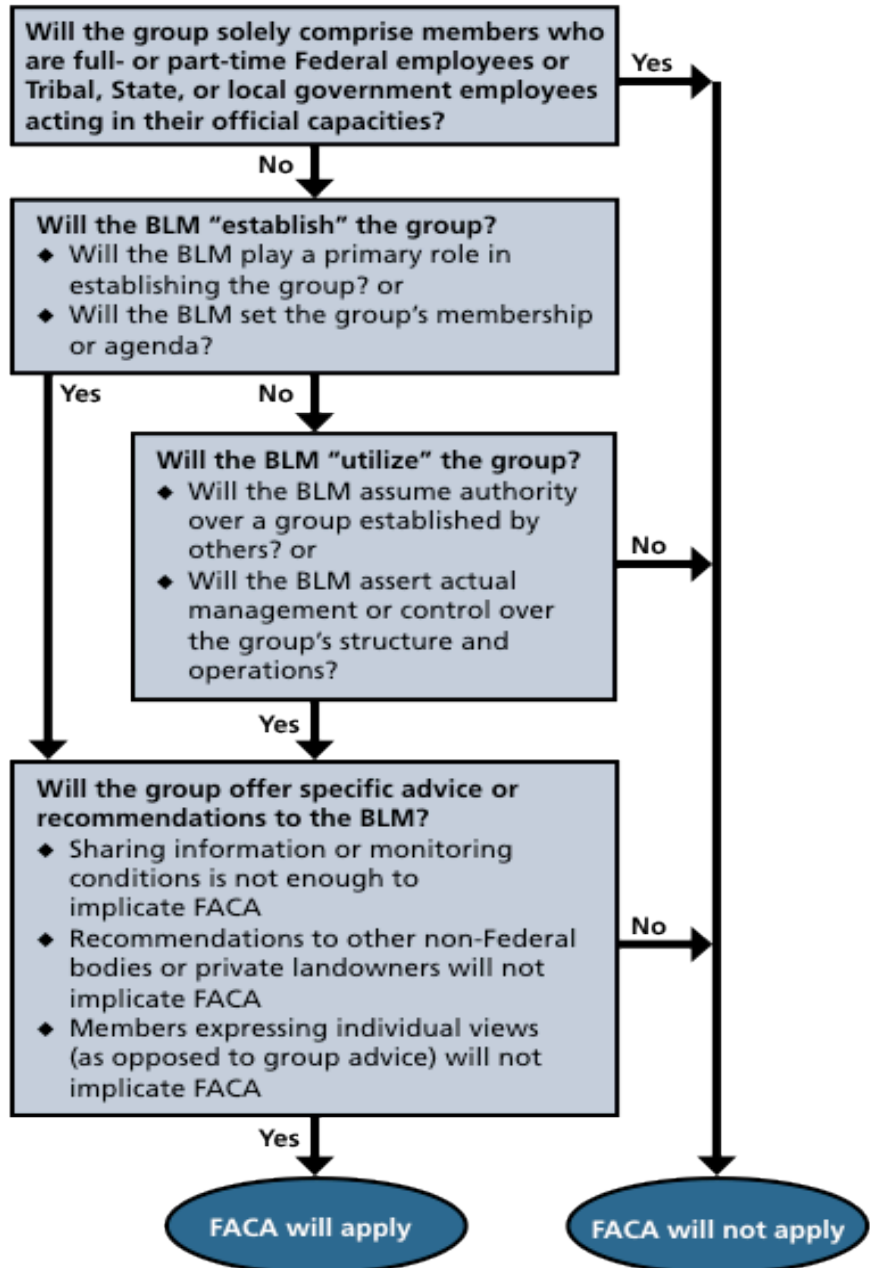
For more information on the requirements of the Federal Advisory Committee Act, contact the General Services Administration's Committee Management Secretariat at (202) 273-3556.



## 2. BLM DECISION TREE

### Does FACA Apply?

*Indicators for determining the applicability of the Federal Advisory Committee Act (FACA) to the Bureau of Land Management's Alternative Dispute Resolution-based Collaborative Community Working Groups*



*Note: This chart was derived from a decision tree published in the Administrative Law Journal in 1996, included in the Further Information section at the end of this guidebook.*



### 3. MEMO BY JEFF SILVYN, GENERAL COUNSEL OF USIECER, JANUARY 25, 2010

#### **How the Federal Advisory Committee Act relates to U.S. Institute work**

The Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. 2, imposes certain procedural requirements on some, but not all, types of process in which a federal agency seeks consensus-based advice from non-government groups and individuals. Frequently, our federal agency partners have questions about whether FACA applies to a conflict resolution or collaborative process involving non-government participants under U.S. Institute management. This document provides guidance from the perspective of the U.S. Institute.

#### **What is the U.S. Institute and what do we do?**

Congress created the U.S. Institute as part of an independent, non-partisan federal agency (the Udall Foundation) to provide neutral conflict resolution services for environmental and natural resource issues involving the federal government. 20 U.S.C. § 5604(8). The U.S. Institute works with federal agencies to design and manage collaborative efforts between federal agencies, tribal governments, local governments, affected interests and the public to resolve environmental issues. We help those involved in or affected by an environmental issue or controversy to identify areas of agreement and disagreement and, to the extent possible and appropriate, resolve those differences in a manner acceptable to them.

The specific services provided include assessment, facilitation, mediation, process design, and related services. These services may be used in a variety of situations such as policy development, planning, rulemaking, implementation, enforcement or litigation. OMB CEQ Joint Memorandum on Environmental Conflict Resolution, Nov. 28, 2005 (“OMB CEQ ECR memo”). The form of the process varies and is tailored to the specific issue(s) to be addressed and those involved. The hallmark of a U.S. Institute collaborative process is that the significant decisions about the process and the outcome are determined by participants.

#### **Is U.S. Institute project work subject to FACA?**

Generally, the conflict resolution and collaborative decision-making projects managed by the U.S. Institute are not subject to FACA, but whether a particular process might be subject to FACA depends on the purpose and structure of the process used.<sup>9</sup> The factors to consider are discussed next.

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<sup>9</sup> The U.S. Institute does manage some processes subject to FACA, such as negotiated rulemaking committees.



### What is the intent and purpose of the collaborative group?

FACA may apply when a federal agency seeks a collective, consensus recommendation on a policy or program from a group including non-government participants. FACA does not apply when the federal agency seeks the independent perspective of each participant. So, for example, a listening session, open house, public comment forum, focus group or other activity where each participant expresses a perspective but there is no goal for the participants to harmonize their perspectives to arrive at a broadly accepted view is not subject to FACA. *See* GSA comments on FACA regulations, Federal Register vol. 66, no. 139, pp. 37730, July 19, 2001; 41 C.F.R. § 102-3.40 and Appendix A to Subpart A.

### Who manages and controls the process?

FACA applies when the federal agency with decision-making authority over the subject matter of the advisory committee's deliberations manages or controls the committee and its proceedings.<sup>10</sup> *See* 5 U.S.C. App. 2; GSA comments on FACA regulations on FACA, Federal Register vol. 66, no. 139, pp. 37729-30, July 19, 2001; 41 C.F.R. § 102-3.40 and Appendix A to Subpart A. An amendment to the U.S. Institute enabling legislation clarifies that when the U.S. Institute acts as an independent neutral, managing or controlling a conflict resolution process, FACA does not apply:

#### SEC. 9. USE OF INSTITUTE BY FEDERAL AGENCY OR OTHER ENTITY.

Section 11 of the Morris K. Udall and Stewart L. Udall Foundation Act (20 U.S.C. 5607b) is amended by adding at the end the following:

“(f) AGENCY MANAGEMENT OR CONTROL.—Use of the Foundation or Institute to provide independent and impartial assessment, mediation, or other dispute or conflict resolution under this section shall not be considered to be the establishment or use of an advisory committee within the meaning of the Federal Advisory Committee Act (5 U.S.C. App.).” Pub. Law 111-90, Nov. 3, 2009.

Because the U.S. Institute is an independent agency, and has no regulatory authority over environmental issues, it may convene and manage a conflict resolution or collaborative process to address environmental or natural resource issues within the decision authority of other federal agencies without triggering the requirements of FACA. *See* Miccosukee Tribe of Indians of Florida v. U.S., 420 F.Supp.2d 1324 (S.D. Fl. 2006) (U.S. Army Corps of Engineers did not violate FACA based on participation in process to resolve

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<sup>10</sup> That a federal agency retains final authority over the substantive decision does not by itself trigger coverage under FACA. Rather, a determinative issue is whether the agency controls the deliberative process that involves non-government participants.



disputes over preferred alternative for an EIS when the process was managed and controlled by the U.S. Institute).

There are a number of factors that establish the process is not managed or controlled by the decision-making federal agency and, as a result, not subject to FACA:

Participation: The federal agency charged with decision-making authority over the subject matter of the collaborative effort does not exercise sole control over group membership (i.e. does not have the right to pick representatives of other interests and does not have sole veto authority over membership). Who participates and how is determined by participants or by the U.S. Institute, typically in consultation with some or all participants (i.e. interest groups each responsible for picking their own representative to a process, the U.S. Institute determines who to invite to participate, etc.).

Procedural matters: Procedural matters such as the agenda for meetings, operating rules, and decision-making rules are not determined by the federal agency, but rather are determined collectively by the group or the U.S. Institute in consultation with some or all members of the group.

As long as the guidelines discussed above are followed, the process remains distinct from an advisory committee.



## **APPENDIX I**

### **WRITTEN COMMENTS FROM THE PUBLIC**

(Comments on the MRAPS situation assessment must be emailed to [brooks@ecr.gov](mailto:brooks@ecr.gov) by May 7, 2010. These comments will be posted as an addendum on the USIECR website by May 21, 2010.)





## **APPENDIX J**

### **TRIBAL INVOLVEMENT ASSESSMENT**

(Osprey will submit this Tribal Involvement Assessment by the end of June 2010)

